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No. .....

Supreme Court, U.S.
FILED
MAY 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

J. YOUNG & COMPANY, INC.,

Petitioner,

versus

M/V BOB LIVINGSTON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May, 1986

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30pp

QUESTION PRESENTED FOR REVIEW

Whether, in the absence of physical damage, a party sustaining economic losses may recover those losses from a tortfeasor.

Petitioner respectfully directs the attention of the Court to the matter entitled "James White, d/b/a Blue Wave Oyster Co., et al. vs. M/V TESTBANK", bearing No. 84-1808 on the docket of the United States Court of Appeals for the Fifth Circuit and in which matter a Petition for Writ of Certiorari is currently pending before the United States Supreme Court, October Term, 1985. This matter involves the identical question of law sought to be addressed by petitioner in the instant Petition for Writ of Certiorari.

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Fifth Circuit were:

J. Young & Company, Inc. (lessee and operator of certain portions of the Nashville Avenue Wharf)

Cove Shipping, Inc. (operator of the M/V COVE LEADER)

Cove Ventures, Inc. (owner of the M/V COVE LEADER)

Delta Marine Towing, Inc. (owner of the M/V BOB LIVINGSTON and M/V BILL HALL)

Mission Insurance Company (liability underwriter for the M/V BOB LIVINGSTON and the M/V BILL HALL)

The West of England Ship Owners Mutual Insurance Association of (London) Ltd. (insurer of the COVE LEADER, its owner and operator)

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STATUTE CITED

28 U.S.C. § 1254(1) 2

No. .....

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

OPINIONS BELOW

The opinions below are contained in the appendices to the Petition. Appendix "A" is the decision of the Court of Appeals for the Fifth Circuit, filed February 27, 1986. Appendix "B" is the Findings of Fact and Conclusions of Law of the District Court, dated April 29, 1985. Appendix "C" is the judgment entered by the United States District Court for the Eastern District of Louisiana, dated April 29, 1985.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 27, 1986.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

In the early morning of December 31, 1982, the M/V BOB LIVINGSTON anad the M/V BILL HALL were heading downbound in the Mississippi River with nine barges in tow. The M/V COVE LEADER, traveling behind this procession of barges and tugs, was in the course of overtaking the tow when one of its barges collided with the SEA-BEE Lash Fleet of barges which was moored at the Nashville Avenue Wharf on the Mississippi River within the City of New Orleans. The impact of this collision caused the barges to break tow and float downstream. Eventually, one of the barges sank about thirty or forty feet away from a section of the Nashville Avenue Wharf leased and operated by petitioner.

From the date of the sinking on December 31, 1982, until January 27, 1983, as a result of the sunken barge, petitioner's shipping customers had no access to berths where loading and unloading of cargo normally took place. Petitioner's customers were forced to dock at distant berths and petitioner was obliged to engage additional equipment and to hire extra labor in order to service them. Accordingly, petitioner thereby sustained economic losses.

As a result, petitioner filed suit in the United States District Court for the Eastern District of Louisiana against the parties involved in the casualty which resulted in the sinking of the barge. Liability was stipulated subject to the right of petitioner to recover economic losses. The District Court held that *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) and *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F. 2d 1019 (5th Cir. 1985) (*en banc*) precluded recovery by petitioner and dismissed the Complaint.

Petitioner appealed from the judgment of the District Court in favor of respondents. The Court of Appeals for the Fifth Circuit issued an opinion filed on February 27, 1986, affirming the order of the District Court.

—o—

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In dismissing petitioner's suit for economic losses because of the absence of an accompanying physical injury to a proprietary interest, the Court of Appeals and the District Court disregarded completely the basic concepts of foreseeability and proximate cause. The result reached has profound and far reaching effects on the important field of tort recoveries.

The decisions relied upon by the Court of Appeals and the District Court, that of the Supreme Court in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), and that of a divided Court of Appeals in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th

Cir. 1985) (*en banc*), enunciate a rule which is arbitrary, unsound, and anachronistic.

Petitioner's position is well stated in the dissent of the *TESTBANK* case:

> *ROBINS* was a tort case grounded on a contract. Whatever the justification for the original holding, this Court's requirement of physical injury as a condition to recovery is an unwarranted step backwards in torts jurisprudence The resulting bar for claims of economic loss unaccompanied by any physical damage conflicts with conventional tort principles of foreseeability and proximate cause. *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 at 1035. (Wisdom, J., dissenting)

The continued application of a doctrine precluding liability for negligence which results only in economic loss is unwarranted. Petitioner respectfully urges this Court to grant the petition for a writ of certiorari.

CONCLUSION

For the reasons stated in the Petition, the Writ of Certiorari should be granted.

Respectfully submited,

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May, 1986

OF COUNSEL:

Phelps, Dunbar, Marks, Claverie & Sims

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3310
Summary Calendar

J. YOUNG & CO., INC.,

Plaintiff-Appellant,

versus

THE M/V BOB LIVINGSTON, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

(February 27, 1986)

Before RUBIN, REAVLEY and HILL, Circuit Judges.
PER CURIAM:*

Plaintiff J. Young & Co., Inc. (Young) appeals from the dismissal of its suit against defendants, The M/V BOB LIVINGSTON et al.[1] We affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

[1] Defendants-Appellees are Delta Marine, Towing, Inc. (the owner and operator of both the M/V LIVINGSTON and the M/V BILL HALL); Mission Insurance Co. (Delta's Insurer); Cove Ventures, Inc. (the owner of the M/V COVE LEADER); Cove Shipping, Inc. (the operator of the M/V COVE LEADER); and West of England Ship Owners Mutual Association Ltd. (the insurer of the Cove Interests).

I.

On the early morning of December 31, 1982, the M/V BOB LIVINGSTON and the M/V BILL HALL were heading downbound on the Mississippi River with nine barges in tow. The M/V COVE LEADER, traveling behind this procession of tugs and barges was in the course of overtaking them when one of the barges collided with the Sea Bee Lash Fleet moored at the Nashville Avenue Wharf. The impact of the collision caused the barges to break tow and to float downstream. One of the barges sank about thirty or forty feet away from a section of the Nashville Avenue Wharf leased and operated by Young.

From the date of the sinking on December 31 until January 27, 1983, Young's shipping customers had no access to berths where loading and unloading of cargo normally took place. Young's clustomers were forced to dock at distant berths and Young was obliged to use extra equipment and hire extra labor in order to service them.

Finding that Young had no proprietary interest in the Nashville Avenue Wharf, the district court held that *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927), and *Louisiana ex. rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), precluded recovery by Young.

II.

Young's claim fails in two respects. First it lacks a proprietary interest in the wharf. Second, there was no physical damage to its leased interest. In *Robins*, the time charterers of a steamship sought to recover for their lost use of the ship when the defendant drydock company

negligently damaged the propeller. The Supreme Court denied the claim, reasoning that

> [the time charterer's] loss arose only through their contract with the owners and . . . a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.

275 U.S. at 308-09. In *Testbank,* we discerned a dual sigficance in the *Robins* holding. First and most obvious, a claimant seeking recovery must demonstrate injury to a proprietary interest. Second, mere economic loss (such as loss affecting the value of a contract right) is not recoverable. *Testbank* formally united these two principles, holding "there could be no recovery for economic loss absent physical injury to a proprietary interest." 752 F.2d at 1023.

Young, having demonstrated no proprietary interest in this leased portion of the wharf and further having demonstrated no physical damage to his facilities, has no cause of action against defendants.

This opinion is unanimous, but Judge Rubin notes that, while he adheres to the dissenting opinion in *TESTBANK, supra,* the court is bound by that en banc decision.

AFFIRMED.

A true copy.

Test:
Clerk, U.S. Court of Appeals
Fifth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 83-405
consolidated with
83-5741, 83-6216, and 83-5747

SECTION "J"

RIVER & GULF TRANSPORTATION

versus

M/V BOB LIVINGSTON, ETC.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On December 31, 1982, the M/V BOB LIVINGSTON and the M/V BOB HALL were pushing a flotilla of nine barges down the Mississippi River when the M/V COVE LEADER attempted a passing maneuver. The M/V BOB LIVINGSTON and the M/V BILL HALL successfully avoided a collision with the M/V COVE LEADER, but their tow collided with the Sea-Bee Lash Fleet moored at the Nashville Wharf. The wharf was owned by the Board of Commissioners of the City of New Orleans.

Ohio Barge Line, Inc., River & Gulf Transportation Company, Warrior & Gulf Navigation Company, and A & G Transportation Company are the barge owners/operators who claim that they suffered damage due to the collisions. J. Young & Company, Inc. claims loss of use of the Nashville Wharf due to the sinking of a barge in front of a portion of the dock it leased from the Board of Com-

missioners, and also claims that the salvage operations interfered with its use of the dock.

Named as defendants are Delta Marine Towing, Inc. (the owner and operator of both the M/V BOB LIVINGSTON and the M/V BILL HALL); Mission Insurance Company (Delta's insurer); Cove Ventures, Inc. (the owner of the M/V COVE LEADER); Cove Shipping, Inc. (the operator of the M/V COVE LEADER); and West of England Ship Owners Mutual Association, Ltd. (Insurer of the "Cove" interests).

Liability and quantum were bifurcated and the defendants stipulated liability for 100% of the plaintiff's provable damages on the following basis:

—Delta Marine Towing, Inc. and Mission Insurance Company are liable for 65% of the total of all damages; and

—Cove Shipping, Inc., Cove Ventures, Inc., and West of England Ship Owners Mutual Association, Ltd. are liable for 35% of all damages.

Because of the foregoing stipulation, this court's inquiry is limited to a determination of the amount of damage sustained by the plaintiffs. Based upon the evidence introduced at trial, and the stipulations of the parties involved, this court makes the following Findings of Fact and Conclusions of law:

Ohio Barge Line, Inc. and River & Gulf Transportation Company have become a single corporate entity.

Ohio Barge Line, Inc. and/or River and Gulf Transportation Company have paid invoices for the following items due to the collisions:

1)	Damage to Barge AGT-108	$ 6,099.82
2)	Damage to Barge AGT-144	2,159.00
3)	Damage to Barge WGN-511	1,600.00
4)	Salvage Costs	137,633.75
5)	Dockage Charges	2,227.00
6)	Towing and Shifting expense	2,922.50
7)	Electronic Survey (to locate barge)	820.00
8)	Barge Damage Survey	10,329.00
9)	Cargo Loss	77,275.94

The defendants have introduced no evidence controverting the fact that these amounts were proper so this court finds that Ohio Barge Line, Inc. is entitled to recover these items.

River & Gulf Transportation Company was the owner of RGT-73 which sank due to the accident, so it is also entitled to recover $75,000 for the total loss of that vessel.

A & G Transportation Company was the owner of the AGT-204 which also sank, so it is entitled to recover $175,000 for the sinking of that vessel.

The only loss sustained by Warrior & Gulf Navigation Company was physical damage to the WGN-511 in the amount of $1,600. Ohio Barge Line, Inc. is the person legally entitled to recover this item of damage as Warrior & Gulf's subrogee.

Ohio Barge Line surveyed several vessels not owned/operated by any of the parties in this lawsuit. The claims of the plaintiffs for an additional $3,661.50 representing these survey expenses are disallowed because none of the plaintiffs were owners/operators of the following vessels:

HBL-1602B, ITEL-207, Sea Bee-Lash Fleet No. 1-11 Dolphins, LY-26, LY-31, LY-81, and LY-175.

J. Young & Company, Inc. does not have a proprietary interest in the Nashville Wharf. That wharf is owned by the Board of Commissioners of the City of New Orleans. J. Young & Company does have a contractual right to use that wharf, but J. Young & Company did not contract with any of the defendants.

The General Maritime law does not allow recovery for economic loss where there is no physical injury to a proprietary interest, so the claims of J. Young and Company, Inc. must be denied.

Prejudgment interest will be allowed from the date of the collision, December 31, 1982. The rate for prejudgment interest will be the same rate as specified in 28 U.S.C. 1961(a): the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week U.S. Treasury Bills settled immediately prior to the date of the judgment.

The rule of *Robins Dry Dock v. Flint,* 275 U.S. 303, 48 S.Ct. 134 (1927) is as follows: a plaintiff cannot recover for economic loss if the loss resulted from physical damage to property in which he had no proprietary interest. *State of La. Ex Rel Guste v. M/V TESTBANK,* 752 F.2d 1019 (5th Cir., 1985).

In *Kaiser Aluminum v. Chemical Corp. v. Marshland Dredging Co.,* 455 F.2d 957 (5th Cir., 1972) a Marshland Dredging Company barge negligently dropped an anchor damaging an underwater pipeline owned and operated by

Sugar Bowl Gas Company. The gas flow to Kaiser Aluminum was immediately shut off causing an entire plant to shut down. Kaiser sued Marshland Dredging Company for shutdown expenses and production losses, but the district court granted summary judgment dismissing the case based upon *Robins Dry Dock* (supra). The Fifth Circuit affirmed.

The negligence of M/V BOB LIVINGSTON, M/V BILL HALL and/or M/V COVE LEADER caused the Barge RGT-73 to sink in front of the Nashville Wharf. This interfered with J. Young's rights under its contract just as the negligent handling of the anchor by Marshland interfered with Kaiser Aluminum's rights under its contract with Sugar Bowl Gas Company. But, negligent interference with contractual rights is not actionable under maritime tort law. The claims of J. Young & Company must be dismissed.

The general rule in admiralty is that those injured by tortious collision are entitled to prejudgment interest as part of just compensation for the wrong done. *Sinclair Refining Company v. S.S. Green Island,* 426 F.2d 260 (5th Cir. 1970). Interest runs from the date of the collision. *American Zinc Co. v. Foster,* 441 F.2d 1100 (5th Cir., 1971).

The court finds no circumstances in this particular case which would justify the disallowance of prejudgment interest, so interest will run from the date of the collision, December 31, 1982.

The parties disagree on the rate of prejudgment interest to be applied. This court recognizes that the rate

of post judgment interest is statutory, but Congress has not indicated what interest rate will apply prior to the date of judgment.

The plaintiffs contend that this court should use the rate of interest provided by Louisiana law. Prior to the amendment to 28 U.S.C. 1961, all federal court judgments were subject to interest at the State rate of interest But, the amendment to that section eliminates the requirement to conform to the State post-judgment rate. Recognizing the benefits of uniformity, this court declines to accept the plaintiff's invitation to set interest at the Louisiana rate. Instead, this court finds that the rate of prejudgment interest should be the same rate as will be applicable after the entry of the judgment.

New Orleans, Louisiana, this the 29th day of April, 1985.

/s/ Patrick E. Carr
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISANA

RIVER & GULF TRANSPORTATION	CIVIL ACTION
VERSUS	NO. 83-405 consolidated with
M/V BOB LIVINGSTON, ETC.	83-5741, 83-6216, and 83-5747
	SECTION "J"

JUDGMENT

In accordance with this court's written Findings of Fact and Conclusions of Law,

IT IS ORDERED, ADJUDGED AND DECREED that there is judgment in favor of plaintiffs, Ohio Barge Line, Inc., and River & Gulf Transportation Company against defendants Delta Marine Towing Inc. and Mission Insurance Company in the amount of $205,443.56 plus interest at the rate specified in 28 U.S.C. 1961(a) from December 31, 1982 until paid.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there is judgment in favor of plaintiff, Ohio Barge Lines, Inc. and River & Gulf Transportation Company against defendants, Cove Ventures, Inc., Cove Shipping, Inc. and West of England Ship Owners Mutual Association, Ltd. in the amount of $110,623.45 plus interest at the rate specified in 28 U.S.C. 1961(a) from December 31, 1982 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment in favor of A & G Transportation Company and against defendants Delta Marine Towing, Inc. and Mission Insurance Company in the amount of $113,750.00 plus interest at the rate specified in 28 U.S.C. 1961(a) from December 31, 1982 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there is judgment in favor of A & G Transportation Company and against defendants Cove Ventures, Inc., Cove Shipping, Inc. and West of England Ship Owners Mutual Association, Ltd. in the amount of $61,250.00 plus interest at the rate specified in 28 U.S.C. 1961(a) from December 31, 1982 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of J. Young & Company, Inc. and Warrior & Gulf Navigation Company are dismissed.

New Orleans, Louisiana, this the 29th day of April, 1985.

/s/ PATRICK E. CARR
UNITED STATES DISTRICT JUDGE